

[Cite as *State v. Saini*, 2010-Ohio-2813.]

STATE OF OHIO            )  
                                  )ss:  
COUNTY OF MEDINA    )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

Appellant

v.

RAJEVE K. SAINI

Appellee

C. A. No.     09CA0030-M

APPEAL FROM JUDGMENT  
ENTERED IN THE  
MEDINA MUNICIPAL COURT  
COUNTY OF MEDINA, OHIO  
CASE No.     08 TRC 10190

DECISION AND JOURNAL ENTRY

Dated: June 21, 2010

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BELFANCE, Presiding Judge.

{¶1} Appellant, the State of Ohio, appeals from the ruling of the Medina Municipal Court which suppressed the breath alcohol content (“BAC”) test results of Defendant-Appellee Rajeve K. Saini. For reasons set forth below, we affirm.

FACTS

{¶2} On November 26, 2008, at approximately 11:57 p.m., Ohio State Highway Patrol Trooper Craig Malone observed Saini throw a cigarette out of his window and onto the highway. Trooper Malone initiated a traffic stop based on the littering offense. Sergeant Cruz, who was nearby as he had assisted Trooper Malone on a prior traffic stop, also pulled over and stopped his vehicle. Upon approaching Saini’s vehicle, Trooper Malone smelled alcohol emanating from the vehicle. As there were two passengers in the vehicle and Trooper Malone was unsure where the odor was coming from, Trooper Malone asked Saini, the driver, to exit the vehicle. Trooper Malone was then able to conclude that the smell of alcohol was coming from Saini. Trooper

Malone also noticed that Saini's eyes appeared red and glassy. Saini admitted to consuming two drinks approximately four hours earlier and that he had previously been at a bar.

{¶3} Trooper Malone then had Saini walk to the back of his cruiser in order to conduct field sobriety tests. Saini did not perform well on the tests, and thus, Trooper Malone arrested, handcuffed, and placed Saini in the back of the cruiser. After moving Saini's vehicle to the side of the road, Trooper Malone drove Saini to the station. Trooper Malone performed the BAC testing at 12:32 a.m. Prior to performing the BAC test, Trooper Malone observed Saini for 18.5 consecutive minutes.

{¶4} Saini was charged with operating a vehicle while under the influence of alcohol in violation of R.C. 4511.19(A)(1)(a), having a prohibited breath alcohol content in violation of R.C. 4511.19(A)(1)(d), and littering upon a highway in violation of R.C. 4511.82. Saini filed a motion to suppress arguing that Trooper Malone lacked probable cause to stop or arrest Saini, that the twenty-minute observation period was not complied with, that the testing instrument was not properly calibrated, and that Saini's statements were obtained in violation of his constitutional rights. After holding a hearing, the trial court granted Saini's motion to suppress concluding that Trooper Malone did not observe Saini for the required twenty-minute time frame prior to initiating the BAC testing.

{¶5} The State has timely appealed raising one assignment of error for our review. Saini has not filed an appellate brief with this Court, and therefore, we may "accept the [State's] statement of the facts and issues as correct and reverse the judgment if [the State's] brief reasonably appears to sustain such action." App.R. 18(C).

## MOTION TO SUPPRESS

{¶6} In its sole assignment of error the State argues that the trial court erred in granting Saini's motion to suppress and erred in concluding that Trooper Malone did not substantially comply with the twenty-minute observation period. We disagree.

{¶7} An appeal from a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶8. This Court must defer to the trial court's findings of fact as the trial court is in the best position to evaluate the evidence and determine the credibility of the witnesses. *State v. Kurjian*, 9th Dist. No. 06CA0010-M, 2006-Ohio-6669, at ¶10. A reviewing court accepts the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Metcalf*, 9th Dist. No. 23600, 2007-Ohio-4001, at ¶6. However, this Court will review the trial court's application of the law to the facts de novo. *Id.*

{¶8} Courts apply a burden-shifting procedure when determining the admissibility of alcohol-test results. *Burnside* at ¶24. "The defendant must first challenge the validity of the alcohol test by way of a pretrial motion to suppress[.]" *Id.* If the defendant does so, the State then "has the burden to show that the test was administered in substantial compliance with the regulations prescribed by the Director of Health." *Id.* If the State satisfies this burden, the defendant must then show that he or she was prejudiced by the State's failure to strictly comply with the regulations. *Id.* The substantial-compliance standard excuses only those deviations that are "clearly de minimis" or can be classified as "minor procedural deviations." (Internal quotations and citation omitted.) *Id.* at ¶34.

{¶9} R.C. 4511.19(D)(1)(b) states that a defendant's breath "shall be analyzed in accordance with methods approved by the director of health by an individual possessing a valid

permit issued by the director of health pursuant to [R.C. 3701.143].” “R.C. 3701.143 requires the director of health to set forth the techniques and/or methods to analyze a person's breath to ascertain the presence and amount of alcohol in that person's system.” *State v. Hayes*, 9th Dist. No. 04CA0105-M, 2005-Ohio-6607, at ¶7. Ohio Adm.Code 3701-53-02(D) provides that breath samples shall be analyzed according to the operational checklist for that instrument. See *Hayes* at ¶8. The operational checklist requires that the defendant be observed for twenty minutes prior to the testing. See *Bolivar v. Dick* (1996), 76 Ohio St.3d 216, 218. “It is clear that the focus of this item is to prevent oral intake of any material[.]” (Internal quotations and citation omitted.) *Id.* “The accuracy of the test can also be adversely affected by internal material found in belching or regurgitation.” *Painter & Weiler, Ohio Driving Under the Influence Law* (2009-2010), Section 8.17.

{¶10} In the instant case, the State submitted the police cruiser video of the traffic stop. The State also called Trooper Malone to testify. Trooper Malone initiated the traffic stop at approximately 11:57 p.m. At approximately 11:58 p.m. Trooper Malone escorted Saini to the rear of the police cruiser, out of view of the police camera, to perform field sobriety testing on Saini. Trooper Malone did not testify that he checked Saini’s mouth in order to ensure that it was empty prior to cuffing him and placing him in the cruiser. However, he testified that Saini did not have anything in his mouth, which he indicated he knew because he observed Saini’s mouth as he was talking to him. Although it was the midnight hour and therefore dark, he did not elaborate as to how close or how far he was to Saini when observing his mouth. The BAC testing form indicates that Trooper Malone initiated observation of Saini at 12:03 a.m. At approximately 12:06 a.m., after Saini had failed the field sobriety testing, Trooper Malone arrested Saini. Trooper Malone testified to checking Saini’s pockets and stated that he did not

find anything in them. Trooper Malone stated that he handcuffed Saini with his hands behind his back and put him in the back of the police car. Between approximately 12:09 a.m. and 12:13 a.m., Trooper Malone and Sergeant Cruz were not observing Saini but were at Saini's vehicle; Sergeant Cruz moved Saini's passengers to somewhere outside the view of the cruiser camera, and Trooper Malone moved Saini's vehicle. At approximately 12:13 a.m., Trooper Malone returned to his cruiser. Trooper Malone then read Saini his rights and drove to the station. During the drive, Trooper Malone talked with Saini for most of the drive. Trooper Malone testified that he observed Saini at all times while they were in the BAC room. He stated he never saw Saini put anything in his mouth and that there was nothing in his mouth when he checked it prior to the BAC testing. Trooper Malone conducted Saini's BAC testing at 12:32 a.m.

{¶11} We note that while the determination of whether Trooper Malone substantially complied with the regulations is a legal determination, which we consider de novo, *Metcalf* at ¶6, the determination of whether Trooper Malone observed Saini for twenty minutes prior to testing is a factual determination, see *State v. Edens* (July 31, 1987), 11th Dist. No. 1768, \*1, which we are bound to uphold if it is supported by competent, credible evidence. *Metcalf* at ¶6.

{¶12} The BAC recording paper indicates that the observation period began at 12:03 a.m. at a point in time when Trooper Malone was administering the field sobriety tests. The video recording indicates that Trooper Malone arrested Saini at 12:06 a.m. The test occurred at 12:32 a.m.; thus, using either the 12:03 a.m. time or the 12:06 time, the alleged observation period totals well over twenty minutes. However, "violation of the required observation period can occur when either the total period of observation is less than 20 minutes or when the period of observation, although totaling 20 minutes or more, is allegedly interrupted by a lack of observation or the subject's ingestion of oral material." (Footnote omitted.) Painter & Weiler,

Ohio Driving Under the Influence Law (2009-2010), Section 8.17. See, also, *State v. Marinacci* (Nov. 6, 2000), 5th Dist. No. 00CA03, at \*4.

{¶13} In the case sub judice, the trial court concluded that

“based on review of the videotape, that the trooper was not observing the defendant during the period of time when he exited his cruiser and went into the defendant’s vehicle, moving it off of the road. Thus, the period of observation was broken and should have been recommenced. As the trooper did not observe the defendant for 20 consecutive minutes prior to the breath test, the court determines that the breath should be suppressed.”

In doing so, the trial court focused on the one minute when Trooper Malone moved Saini’s vehicle to the side of the road. The record supports the court’s finding concerning the Trooper’s activities during that minute. However, we also note that immediately prior to that minute there were approximately three more minutes during which Trooper Malone was away from the cruiser where Saini was seated. We acknowledge that the Supreme Court has held that “the failure to observe the subject for a ‘few seconds’ [of the twenty-minute observation period] while the officer exited and walked around his patrol car did not render the test results inadmissible.” *Burnside* at ¶22, quoting *State v. Steele* (1977), 52 Ohio St.2d 187, 189. However, the Supreme Court of Ohio has never determined that a four-minute break in observation was a de minimis deviation. We are not inclined to extend the Court’s decision. Thus, we see no error in the trial court’s finding that there was a break in the observation period requiring the observation period to be recommenced when the break in observation totaled approximately four minutes. See *Marinacci*, at \*4. Thus, the observation period actually commenced at approximately 12:13:30, which was the point in time where Trooper Malone returned to the vehicle and began observing Saini.

{¶14} There is likewise no error in the trial court’s finding that Saini was observed for less than twenty minutes prior to testing. Trooper Malone returned to his cruiser at

approximately 12:13:30 a.m. and the testing was performed at 12:32 a.m. Thus, Saini was observed for only approximately 18.5 minutes.

{¶15} The State argues that there was substantial compliance with the twenty-minute observation rule. While this Court has concluded that a period of observation in excess of nineteen minutes was in substantial compliance with the regulations, *State v. Wooley* (Mar. 3, 1999), 9th Dist. No. 2912-M, at \*2, we refuse to conclude that an observation period of 18.5 minutes was in substantial compliance with the regulations. We are aware that the purpose of the observation period is to prevent the defendant from ingesting anything during the twenty-minute observation period, *Dick*, 76 Ohio St.3d at 218, whether from a new external substance or one that may present itself in the suspect’s mouth through regurgitation or other means. Furthermore, we are equally aware that the required observation period is twenty minutes. Substantial compliance contemplates only “de minimis” deviations. *Burnside* at ¶34. We cannot say the deviation here was de minimis. As noted above, although the Ohio Supreme Court has determined that a walk around the vehicle lasting a few seconds was a de minimis deviation, it has never held that a one and a half minute deviation (or 7.5% of the total observation time) constitutes substantial compliance.

{¶16} Therefore, as the trial court correctly found that the twenty-minute observation period was not substantially complied with, we overrule the State’s assignment of error.

#### CONCLUSION

{¶17} In light of the foregoing, we affirm the judgment of the Medina Municipal Court.

Judgment affirmed.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Medina Municipal Court, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

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EVE V. BELFANCE  
FOR THE COURT

MOORE, J.  
CONCURS

WHITMORE, J.  
DISSENTS, SAYING:

{¶18} I respectfully dissent as I would reverse the trial court’s decision to grant Saini’s motion to suppress. The Ohio Supreme Court only requires *substantial* compliance with regard to the twenty-minute observation period for BAC testing. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶24. Further, this Court has specifically held that:

“A witness who testifies to the foundational fact that the defendant did not ingest anything during the twenty-minute period prior to the administration of the breath test \*\*\* is not required to show that the subject was constantly in his gaze, but only that during the relevant period the subject was kept in such a location or condition or under such circumstances that one may reasonably infer that his



ingestion of any material without the knowledge of the witness is unlikely or improbable.” (Internal quotations omitted.) *State v. Hayes*, 9th Dist. No. 04CA0105-M, 2005-Ohio-6607, at ¶13, quoting *State v. Adams* (1992), 73 Ohio App.3d 735, 740.

“Hypothetical assertions” that a defendant may possibly have belched or regurgitated something are insufficient to defeat the State’s showing of substantial compliance. *State v. Steel* (1977), 52 Ohio St.2d 187, 191-92.

{¶19} Trooper Craig Malone testified that he observed Saini from the point he began field testing him, but at the very latest Trooper Malone’s report indicates that he began observing Saini at 12:03 a.m. Trooper Malone testified that Saini did not have anything in his mouth and that when he searched Saini incident to his arrest, Saini did not have anything in his pockets. Trooper Malone arrested Saini, handcuffed him with his hands behind his back, and placed him in the back of the cruiser. Saini remained in the back of the cruiser until Trooper Malone drove him to the station, removed him, and performed the BAC test. Trooper Malone only left Saini alone in the cruiser when: (1) he and another officer were removing Saini’s two passengers from Saini’s vehicle; and (2) he moved Saini’s vehicle over several feet to ensure that it was a safe distance from the far lane of the highway. As the majority correctly notes, Trooper Malone only left Saini in the cruiser for approximately four minutes.

{¶20} Apart from Trooper Malone’s testimony, the State presented the recording of Saini’s traffic stop. The audio on the recording is extremely sensitive. During the period of time Trooper Malone left Saini in the back of the cruiser, one can hear Saini in the back of the vehicle, inhaling and exhaling loudly a few times and muttering “oh, f\*\*k” at one point. Saini did not make any choking noises or otherwise that might even reasonably suggest that he regurgitated at any point.

{¶21} The majority essentially holds that officers must *strictly* comply with the observation period. No trier of fact could reasonably infer, based on Trooper Malone’s testimony and the recording of the traffic stop, that Saini ingested something. *Adams*, 73 Ohio App.3d at 740. Saini did not have anything in his mouth or on his person, was handcuffed from behind, and was placed, alone, in the backseat of Trooper Malone’s cruiser. Any suggestion that Saini might have ingested some unknown material or might have silently regurgitated something is nothing more than a “hypothetical assertion.” *Steel*, 52 Ohio St.2d at 192.

{¶22} Because the State met its burden to demonstrate substantial compliance and Saini did not demonstrate prejudice as a result of the State’s failure to strictly comply, I would sustain the State’s assignment of error. As such, I respectfully dissent.

APPEARANCES:

ARTHUR EDWARD FOTH, Medina City Prosecutor, for Appellant.

MARK MARIOTTI, Attorney at Law, for Appellee.